

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Procedures for Reviewing Requests for  
Relief From State and Local Regulations  
Pursuant to Section 332(c)(7)(B)(v)  
Communications Act of 1934

)  
)  
) WT Docket No. 97-192  
)  
)

Guidelines for Evaluating the  
Environmental Effects of Radiofrequency  
Radiation

) ET Docket No. 93-62  
)  
)

Petition for Rulemaking of the Cellular  
Telecommunications Industry Association  
Concerning Amendment of the  
Commission's Rules to Preempt State  
and Local Regulation of Commercial  
Mobile Radio Service Transmitting  
Facilities

)  
) RM-8577  
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To: The Commission

**CONSOLIDATED OPPOSITION TO MOTIONS TO DISMISS**

Ameritech Mobile Communications, Inc. (Ameritech), by its attorneys, hereby submits its opposition to the motions to dismiss filed by the Ad-Hoc Association of Parties Concerned About the Federal Communications Commission's Radiofrequency Health and Safety Rules (Ad-Hoc Association) and the Cellular Phone Taskforce (CPT), concerning Ameritech's October 14, 1997 Petition for Partial Reconsideration and/or Clarification ("Petition") of the Commission's Second Memorandum Opinion and Order and Notice of Proposed Rulemaking ("Second MO&O") in the above captioned proceeding, FCC 97-303, released August 25, 1997.

As demonstrated below, the motions of the Ad-Hoc Association and CPT fail to demonstrate a basis for dismissing Ameritech's Petition. The Petition seeks reconsideration or clarification of policies adopted for the first time or modified in the Second MO&O. Therefore, it complies with the requirements of Rule Section 1.429.

# **I. Ameritech Properly Seeks Reconsideration of the FCC's Interim Policy on State and Local Regulation of RF Matters.**

In its Petition, Ameritech asks the Commission to reconsider, or at least clarify, the interim policy it adopted in the Second MO&O concerning the ability of State and Local Governments to require Commission licensees to demonstrate compliance with the Commission's radiofrequency (RF) radiation rules. Petition at pp. 2-3. Therein, Ameritech demonstrated that the interim policy allows State and Local Governments to immediately impose upon licensees onerous compliance showings, even if these licensees are "categorically exempt" from making such showings to the Commission itself. The Ad-Hoc Association and CPT both argue that Ameritech cannot raise this issue, because the paragraph adopting the interim policy "is part of a new Notice of Proposed Rulemaking WT97-192, ("NPRM") and is not part of the 2nd MO&O." Ad-Hoc Association Motion at p. 2. See also CPT Motion at p. 2. However, Ameritech has sought reconsideration of the entire document entitled "Second Memorandum Opinion and Order and Notice of Proposed Rulemaking" adopted by the Commission in this proceeding. Ameritech's Petition includes in the caption both ET Docket No. 93-62 and WT Docket No. 97-192, as does the Second MO&O itself. Neither the Ad-Hoc Association nor CPT provide any legal basis for requiring separate petitions for reconsideration in these combined and directly related proceedings.

CPT also argues that "Ameritech is asking the Commission to make interim rules concerning State and local information requests [and t]his is something the Commission has declined to do." CPT Motion at p. 2 (footnotes omitted). However, Ameritech's Petition does not request interim rules, but instead clearly and properly asks that the Commission "change or clarify its interim policy..." Petition at p. 3 (emphasis added). Because the interim policy will have an immediate and harmful impact on Ameritech and thousands of other licensees, and is likely to be in place for several months or even years while permanent rules are under consideration, Ameritech's request is entirely appropriate. Although the policy is described as

"non-binding" (Second MO&O at para. 145), even non-binding policies are properly challenged when the agency intends "to use that framework to cabin its discretion." United States Telephone Association v. FCC, 28 F. 3d 1232, 1234(D.C. Cir. 1994).<sup>1</sup> The Commission has previously entertained petitions for reconsideration of interim rules and policies. E.g., Inquiry as to Automatic Vehicle Locator Systems, 49 FCC 2d 1195, 1195 (1974) (Memorandum Opinion and Order) (reconsidering interim procedures for the licensing and operation of automatic vehicle monitoring radio systems at the request of Boeing Company); Transport Rate Structure and Pricing, 10 FCC Rcd 3030, 3031, 3047-48 (1994) (Third Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking) (reconsidering interim rules for transport rate structures).

## **II. Ameritech Properly Requests the Commission to Prescribe a More Specific Cost Sharing Formula.**

In its Petition (at pp. 3-4), Ameritech has asked the Commission to prescribe a detailed cost sharing formula for bringing a site occupied by multiple licensees into compliance. Both the Ad-Hoc Association and CPT argue that this request is repetitious, because Ameritech already sought such relief in its September 6, 1996 Petition for Reconsideration and

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<sup>1</sup> Whether an agency pronouncement is a non-binding policy or a rule "turns on the agency's intention to bind itself to a particular legal policy position." Public Citizen, Inc. v. United States Nuclear Regulatory Commission, 940 F. 2d 679, 681-82 (D.C. Cir. 1991) (quoting Vietnam Veterans v. Secretary of the Navy, 843 F. 2d 528, 538 (D.C. Cir. 1988). In United States Telephone Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994), the United States Court of Appeals for the District of Columbia Circuit struck down the Commission's Forfeiture Policy Statement, stating that "the FCC was obliged, under the [Administrative Procedure Act] (APA), to put the forfeiture standards out for comment." Id. at 1234. This was true even though the Commission had labeled its forfeiture guidelines as a non-binding policy, and stated 12 times that it retained the discretion to depart from its forfeiture standards in specific circumstances. Id. The Commission has likewise labeled its interim policy on RF compliance as non-binding, but States and licensees alike will no doubt be forced to rely on the policy for several months pending permanent rules; and the Commission may be hard-pressed to deny approval of a State or local requirement which mirrors the language of the interim policy.

Clarification ("First Petition") of the Commission's initial Report and Order 11 FCC Rcd 15123 (1996)("Report and Order") in this proceeding. Ad-Hoc Association Motion at pp. 2-3; CBT Motion at p. 2. However, as both of these parties acknowledge, Rule Section 1.429(i) provides in pertinent part that "[a]ny order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order." In this instance, Ameritech originally noted the vagueness of the FCC's cost sharing policy and requested clarification in its First Petition. The FCC modified its policy by declining to adopt "detailed instructions on how to allocate responsibility," instead prescribing "suggested" alternatives. Second MO&O at para. 75. As discussed in Ameritech's pending Petition, the informal policy embodied in these suggestions remains vague, and is self-contradicting in certain respects. The Commission indicates that it chose this course because of a desire to retain flexibility for licensees, because "some particular circumstances may dictate different solutions." Id. In response to this modification, Ameritech is now seeking more specific procedures, including an option that would allow licensees to vary the prescribed cost-sharing formula by mutual consent. Petition at p. 4. This new proposal would create an incentive for parties to negotiate (due to the enforceability of the requirement), while being directly responsive to the Commission's expressed desire to retain flexibility for licensees. Thus, Ameritech's request falls squarely into the type of reconsideration issues allowed under Rule Section 1.429(i).

### **III. Ameritech Properly Seeks Clarification of the Conflicting Policy Statements Concerning Responsibilities of New Facility Applicants.**

The Ad-Hoc Association (Motion at p. 4) and CPT (Motion at p. 2) both argue that Ameritech cannot seek clarification of the responsibilities of a new facility applicant for bringing a site into compliance with the RF rules, because this request is alleged to be repetitive. However, while Ameritech sought clarification of these responsibilities in its First Petition (at pp. 12-13), the Commission's response in the Second MO&O was to provide conflicting policy

statements governing this issue. As detailed in Ameritech's current Petition (at pp. 4-5), the Commission suggests at paragraph 75 of the Second MO&O that a new applicant may be held responsible for the entire compliance burden if its proposed facility would create a violation. In a somewhat confusing manner, the Commission suggests in the same paragraph that new applicants can file a grievance with the Commission if they are denied access to a site, or if existing licensees are attempting to place "unreasonable financial burdens" on the applicants. This seemingly contradictory modification of the Commission's policy has the unfortunate result of creating uncertainty on the part of the industry, and Ameritech has properly sought clarification. It was not until the Second MO&O was released that Ameritech was faced with these contradictory policy statements.

Contrary to the Ad-Hoc Association's argument at page 4 of its Motion, Ameritech had not previously sought clarification of whether site owners will retain the right to refuse access to a new applicant seeking to use their site. This matter did not become an issue until the Commission's statement in the Second MO&O at paragraph 75 that denial of site access may constitute grounds for a complaint to the Commission. This newly presented issue is an important one, since it would obviously hamstring the ability of site owners and existing licensees to prevent new applicants from causing RF rule violations.

#### **IV. Ameritech Properly Requests a Reasonable Transition Period for Existing Licensees Impacted by New Facility Proposals.**

In its Petition, Ameritech requested that the Commission allow existing licensees 90 days or some other reasonable transition period, if they must come into compliance with the new RF rules as a result of actions taken by a new applicant for their antenna site. Petition at pp. 5-6. The Ad-Hoc Association asserts at page 4 of its Motion that the Commission already addressed the issue of when an existing licensee must comply with the new RF rules, by indicating in the Report and Order that "actions necessary to bring the area into compliance

with the guidelines are the shared responsibility of all licensees..." Thus, the Ad-Hoc Association argues that Ameritech was required to raise this issue in its First Petition. Although this argument is specious, Ameritech did in fact raise the general issue of a reasonable transition period in its First Petition (at pp. 4-6); the specific issue which Ameritech now raises has been triggered by the FCC's statement (at paragraph 75 of the Second MO&O), asserting that when another transmitter locates at an existing site, then "the new criteria must be used to evaluate the entire site." As CPT acknowledges (Motion at p. 3), the FCC's initial Report and Order in this proceeding indicated that existing licensees did not have to be concerned with compliance with the new rules until renewal or modification of their facility. *Id.* at para. 119. This conclusion was only bolstered by the Commission's suggestion in the Second MO&O that a new applicant could be held responsible for the entire compliance burden. However, the above quoted language of paragraph 75 casts doubt on this interpretation, creating a valid new concern which Ameritech has now properly raised. Thus, this issue likewise complies with Rule Section 1.429(i).

#### **V. Ameritech Has Properly Sought Limited Responsibilities for Site Owners.**

The Ad-Hoc Association and CPT argue that Ameritech cannot ask the Commission to impose certain limited compliance requirements on site owners, because this request was already raised by Ameritech below, and addressed in the Second MO&O. This argument also mischaracterizes the record. Ameritech's First Petition requested that site owners be held fully responsible for RF compliance, because they are uniquely situated to ensure such compliance. The Second MO&O declined to adopt this requirement because of the Commission's concern that site owners "may not have the capability or understanding to make sure that transmitter facilities on their property are in compliance." *Id.* at para. 73. Nonetheless, the Commission acknowledged that site owners have significant control over the ability of applicants and licensees to comply with the RF rules. *Id.* at para. 74. While the Commission accordingly

adopted a policy of encouraging site owner cooperation, Ameritech has properly requested in its pending Petition that a more binding commitment be placed on these entities. Ameritech's current proposal differs from its initial request because site owners would have only limited duties (providing site user information and instructing new applicants to verify continuing RF compliance). These limited duties would address the Commission's concern that site owners lack the necessary capability to shoulder full RF compliance responsibility, while at the same time helping licensees and applicants to ensure that they can meet their burdens under the new rules.

#### **VI. Ameritech Correctly Seeks Clarification of the Warning Sign Requirements.**

The Ad-Hoc Association (at p. 6) and CPT (at p. 3) argue that Ameritech cannot request additional guidance concerning the use of warning signs, because warning signs were not addressed in the Second MO&O. However, Ameritech's First Petition requested that the Commission clarify the steps necessary for compliance (at p. 1), and specifically discussed the role of warning signs in certain situations (at p. 3). The Commission has failed to provide adequate guidance on this issue, as the Ad-Hoc Association acknowledges (Motion at p. 6). Section 1.425 requires that the Commission consider relevant comments in a rulemaking proceeding, and issue a finding on such comments and a brief statement of the reasons therefor. 47 CFR §1.425. Because the Commission's warning sign requirements remains vague, Ameritech has properly requested that these requirements be clarified on reconsideration.

Without substantive guidance on this point, the industry is likely to expend significant resources plastering antenna sites with duplicative or even conflicting warning signs, negating the effectiveness of this compliance measure. While the Ad-Hoc Association suggests that Ameritech can raise this matter in the form of a request for clarification of OET Bulletin No. 65, the Commission is not obligated to respond to such request. Therefore, reconsideration is appropriate.

## **VII. The Ad-Hoc Association's Allegation of Delay is Without Merit.**

The Ad-Hoc Association argues (at p. 8) that Ameritech Petition must be dismissed because it may have the effect of delaying Court consideration of an appeal of the Second MO&O in which the Association is participating. However, the pendency of this appeal does not deny Ameritech its right to request reconsideration of the Second MO&O. In Wrather-Alvaraz Broadcasting, Inc. v. FCC, 248 F. 2d 646 (D.C. Cir. 1957), the Court of Appeals noted that parties to Commission proceedings have a choice of whether to seek relief from the Commission itself or from the Courts. The Commission and an appellate court may both review the same agency order. Id., 248 F. 2d at 649. Ameritech has thus properly exercised its choice of where to seek review.

Moreover, while Ameritech seeks specific clarifications and refinements of certain modifications made in the Second MO&O, the Ad-Hoc Association seeks to overturn the Commission's RF rules in general. Because the parties' issues do not overlap, Ameritech's Petition is unlikely to delay consideration of any appeal. Ameritech notes that any delay in the consideration of the Ad-Hoc Association appeal is likely to result from the fact that the same attorney has filed appeals of the Second MO&O in at least three courts, the Second Circuit, Ninth Circuit and District of Columbia Circuit. The Second Circuit Appeal was filed by CPT, while the Ad-Hoc Association is participating in the other two appeals. As counsel may have anticipated, the parties and the Courts will presumably have to engage in various pleading cycles to consolidate these duplicative appeals.

Finally, as demonstrated above, Ameritech has raised valid concerns based on new information garnered from the Second MO&O. Ameritech has participated in this proceeding from the beginning, and the Commission has adopted or at least acknowledged the merit of all or most of its suggestions. Ameritech's Petition identifies for the Commission remaining

issues which will impair the ability of licensees and applicants to comply with the new RF rules, to the ultimate detriment of the public. While there is always room for divergent viewpoints on a given set of issues, the Ad-Hoc Association's repeated characterization of Ameritech's Petition as "frivolous" is unfounded and irresponsible.

**Conclusion**

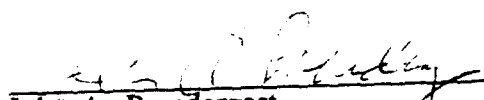
In light of the foregoing, it is respectfully requested that the Commission deny the Motions of the Ad-Hoc Association and CPT.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Elizabeth A. Ohr, an employee in the law firm of Blooston, Mordkofsky, Jackson & Dickens hereby certify that on the 10th day of December, 1997, copies of the foregoing "Consolidated Opposition to Motions To Dismiss" were deposited in the U.S. Mail, postage prepaid, or by hand delivery, by messenger (\*) to the following:

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